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No. 03-583

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

JOHN D. ASHCROFT, UNITED STATES ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a conviction for driving under the influence with serious bodily injury under a state statute, such as Fla. Stat. § 316.193(3), which requires proof of causing injury to another, but (i) does not require proof, or involve a substantial risk, of the intentional (or even reckless) application of physical force against the person or property of another, and (ii) does not require proof of any active application of physical force by a defendant against the person of property of another, is a crime of violence under 18 U.S.C. § 16, that constitutes an aggravated felony under § 101 of the Immigration and Nationality Act and therefore a basis for removal of a non-U.S. citizen from the United States.

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Josue Leocal was the petitioner in the court of appeals. Respondents, John D. Ashcroft, the United States Attorney General, and the Immigration and Naturalization Service, were the respondents in the court of appeals. Petitioner Josue Leocal was the respondent before the Board of Immigration Appeals and the Immigration and Naturalization Service was the only other party before the Board of Immigration Appeals.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

Petitioner respectfully requests that this Court vacate the order of the United States Court of Appeals for the Eleventh Circuit which dismissed petitioner's petition for review for lack of jurisdiction and direct the court of appeals to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reproduced at J.A. 115-17. The opinion of the Board of Immigration Appeals is unpublished and is reproduced at J.A. 105-08.

JURISDICTION

The court of appeals dismissed the petition for review on June 30, 2003. Petitioner timely filed a petition for a writ of certiorari on September 29, 2003. On February 23, 2004, this Court granted certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The statutes relevant to this proceeding are 8 U.S.C. § 1101(a)(43)(F), 8 U.S.C. § 1101(h), 8 U.S.C. § 1182(a)(2)(E), 18 U.S.C. § 16, and Fla. Stat. § 316.193(3)(c)(2). They are reprinted in the appendix to this brief.

STATEMENT

A. Facts

Petitioner Josue Leocal entered the United States from Haiti in August 1980 at the age of 24. R. 286. He resided in Miami, Florida. *Id.* He married a U.S. citizen and has four children, all of whom are U.S. citizens. R. 181, 210-11, 288-94. Mr. Leocal worked in the United States as a construction worker, mechanic and welder. R. 211. As of December 19, 1987, Mr. Leocal became a lawful permanent resident, and he applied for naturalization in March 1997. R. 297-98. At the time of the conviction that is the subject of this matter (in 2000), Mr. Leocal had been in the United States for more than 19 years and he had no prior criminal record. R. 211. In August 2000, he was determined to be ineligible to naturalize based on the conviction at issue in this case. R. 298.

On January 7, 2000, Mr. Leocal was arrested following a car accident in Miami-Dade County in which two individuals were injured. R. 331-35. One of those injured in the accident was treated and released at the scene of the accident. R. 333. The other was transported to Jackson Memorial Hospital's Trauma Center for treatment. *Id.* Mr. Leocal later pleaded guilty to two counts of driving under the influence of alcohol and causing serious bodily injury, in violation of Fla. Stat. § 316.193(3)(c)(2) (2001). R. 322. Although Mr. Leocal had no prior criminal record, the circuit court for Dade County sentenced him to 2.5 years in prison on the first count and 2.5 years of probation on the second. R. 325.

Mr. Leocal served more than two years of his sentence, during which time he completed a ten-month course of treatment for alcohol abuse. R. 290. Mr. Leocal was released from prison into the custody of the Immigration and Naturalization Service ("INS") in April 2002. On November 18, 2002, the INS removed Mr. Leocal to Haiti, without notice to his legal counsel of record either before or after his removal. Mr. Leocal's counsel only learned of his removal after trying to contact him to discuss his on-going appeal in the Eleventh Circuit.

B. Procedural History

On November 22, 2000, Mr. Leocal received a notice to appear charging him as removable pursuant to INA § 237(a)(2)(A)(iii) for having committed an "aggravated felony" as defined in INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2002). R. 364-66. The removal proceeding was based on Mr. Leocal's Florida conviction for DUI with serious bodily injury, Fla. Stat. § 316.193(3)(c)(2), which the INS deemed a "crime of violence" as defined in 18 U.S.C. § 16. *Id.* The "aggravated felony" charge was the only charge contained in the notice to appear and the only asserted basis for Mr. Leocal's removal. *Id.*

On October 16, 2001, an immigration judge ordered Mr. Leocal removed to Haiti. J.A. 83, 97-102. In doing so, the immigration judge relied on *Le v. Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), because Mr. Leocal's removal proceedings were instituted within the Eleventh Circuit. J.A. 89-90. In *Le*, the Eleventh Circuit endorsed as reasonable the Board of Immigration Appeals' ("BIA" or "the Board") 1998 decision that a conviction for DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) is a "crime of violence" under 18 U.S.C. § 16(a). 196 F.3d at 1354. The immigration judge ruled that Mr. Leocal was ineligible for various forms of relief from the order. Mr. Leocal filed a timely notice of appeal to the BIA on November 5, 2001. J.A. ii. On April 24, 2002, the BIA affirmed the immigration judge's decision and dismissed the appeal. J.A. 104. Because of a clerical error (the Board used the incorrect address for Mr. Leocal's counsel), the decision was not served on Mr. Leocal or his counsel. J.A. 106.

Prior to learning that the BIA had issued a decision, counsel for petitioner filed a supplemental brief in light of the Board's issuance of *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc), R. 29-39, in which the Board announced that it would take a new approach in DUI cases -- specifically, it concluded that DUI offenses do not constitute "crimes of violence" under § 16(b). 23 I. & N. Dec. at 346-47. Petitioner urged the Board to consider whether his offense constituted an aggravated felony in light of *Ramos*. R. 29-39. Petitioner argued that the Board was not bound to follow *Le* and could consider *de novo* the question of whether Mr. Leocal's DUI offenses constituted "crimes of violence," because the court in *Le* had not "squarely addressed" the issue. Although the Board in *Ramos* said that it would continue to follow the precedent in circuits that had decided the issue, petitioner argued that in *Le*, the Eleventh Circuit had not done so, but rather had

deferred to the Board's prior approach as reasonable. Therefore, petitioner urged the Board to consider, in light of *Ramos*, whether DUI with serious bodily injury under the Florida statute was a crime of violence.

On August 29, 2002, the Board reopened Mr. Leocal's case, vacated its April 24, 2002 decision, and issued a new decision, but again affirmed the immigration judge's finding of removability. J.A. 105-08. The Board reasoned that although *Ramos* may support Mr. Leocal's position, the Board nevertheless had to apply the Eleventh Circuit's ruling in *Le*, because Mr. Leocal's case arose within the Eleventh Circuit. J.A. 107. Following the Eleventh Circuit's approach in *Le*, the Board dismissed petitioner's appeal because he had been convicted of a "crime of violence" under § 16(a) and thus, an aggravated felony.

Mr. Leocal filed a petition for review of the BIA's decision in the Eleventh Circuit. J.A. iii. The court of appeals requested briefing regarding the court's jurisdiction to consider the petition for review. J.A. 109-12. Following receipt of briefs from the parties, the court ordered that it would carry the jurisdictional issue with the case. J.A. 113-14. On June 30, 2003, after considering briefs on the merits, but without oral argument, the court of appeals dismissed the petition for review. J.A. 115-17. In doing so, the court of appeals agreed with the government's position that the court lacked jurisdiction over Mr. Leocal's case under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"), which limits judicial review of removal orders. The court of appeals concluded that it was bound to follow the panel decision in *Le*, because, in its view, the *Le* panel had concluded that a DUI offense under the same Florida statute constitutes a "crime of violence" under 18 U.S.C. § 16. Accordingly, the court dismissed the petition for review on grounds that it lacked jurisdiction to review an order of

removal for a non-U.S. citizen, permanent resident, who has been convicted of an aggravated felony.

In reaching this conclusion, the Eleventh Circuit rejected petitioner's argument that the court was not bound to follow *Le* because the court of appeals had simply deferred to and affirmed the Board's position as reasonable rather than independently interpreting 18 U.S.C. § 16. When *Le* was decided, the Board still considered all DUI offenses crimes of violence under *Matter of Puente*, 22 I. & N. Dec. 1006 (BIA 1999) (en banc), *withdrawn by Matter of Ramos*, 23 I. & N. Dec. 336 (BIA April 4, 2002) (en banc). Despite petitioner's argument that *Le* did not control his case or preclude the court of appeals from holding that the Board's new approach articulated in *Ramos* is reasonable, the court of appeals ruled that the court in *Le* had "squarely decided" the issue and therefore it lacked jurisdiction to review petitioner's case. The Eleventh Circuit thus relied on its earlier decision in *Le* as the basis for its conclusion that DUI with serious bodily injury under the same Florida statute is a crime of violence under 18 U.S.C. § 16.

Mr. Leocal seeks an order from this Court vacating the Eleventh Circuit's order that it lacks jurisdiction over his petition because his conviction qualifies as a "crime of violence," and thus, an aggravated felony, and directing the Eleventh Circuit to exercise jurisdiction over his petition for review and vacate the BIA's removal order against Mr. Leocal. This result will allow Mr. Leocal to pursue a return to the United States to re-join his family and continue his life here.

SUMMARY OF ARGUMENT

This Court should vacate the Eleventh Circuit's order below and direct the Eleventh Circuit to exercise jurisdiction over Mr. Leocal's petition for review and vacate the removal order in this matter. The Court should take this action because petitioner's violation of Fla. Stat. § 316.193(3)(c)(2), which involved an unfortunate and regrettable event for which petitioner admitted guilt and served over two years in prison, does not qualify as a "crime of violence" under the strict requirements of 18 U.S.C. § 16 because it does not have "as an element the use . . . of physical force against the person or property of another" and does not involve "substantial risk that physical force . . . may be used" against the person or property of another.

First, petitioner's conviction was based on a statute that, like many DUI statutes, has as an element the causation of injury to another, but that does not require that petitioner "use" force, as that term is commonly understood, to cause such injury. The plain meaning of "use" requires the intentional application of physical force against another, but does not encompass the accidental, unintentional or even negligent applications of force that occur in DUI offenses. Similarly, under this plain meaning of "use," DUI offenses (including petitioner's) also do not present "a substantial risk that physical force . . . may be used" during the offense, because any force applied in DUI accidents is typically unintentional.

Second, petitioner's conviction fails to qualify as a crime of violence because, regardless of whether or not one interprets "use" to require intentional application of force, the Florida statute (like many other DUI statutes) does not require proof that a defendant actually applied any physical force whatsoever to a victim. An individual can be convicted under the Florida statute at issue in this case (as well as other state statutes that lack a *mens rea* of intent)

based upon proof of the following: intoxication, operation of a motor vehicle and causation of injury to another as a result of operating the vehicle. Conviction does not require proof of the application of any physical force to the injured victim.

Finally, in addition to the fact that the plain meaning of § 16 demonstrates that DUI offenses involving injury to others do not qualify as "crimes of violence," the use of the term "crime of violence" in another provision of the INA that also refers separately to DUI offenses involving injury (8 U.S.C. § 1101(h)) reflects Congressional understanding that DUI offenses involving personal injury to others are not covered by 18 U.S.C. § 16. Specifically, in § 1101(h) Congress defined "serious criminal offense" to include: (i) any felony, (ii) a "crime of violence" as defined by § 16, *or* (iii) "any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." Because Congress does not include superfluous terms in statutes, the express listing of DUI/DWI offenses involving injury to others separately from "crimes of violence" demonstrates Congress' understanding that the latter does not include the former.

For all of these reasons, petitioner respectfully requests this Court to vacate the order of the Eleventh Circuit and to direct the Eleventh Circuit to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

ARGUMENT

I. DUI WITH SERIOUS BODILY INJURY UNDER FLA. STAT. § 316.193(3)(c)(2) IS NOT A CRIME OF VIOLENCE UNDER 18 U.S.C. § 16(a) BECAUSE IT DOES NOT HAVE "AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OR PROPERTY OF ANOTHER."

Despite a strong national policy in favor of uniform application of the immigration laws, whether someone who is not a U.S. citizen is removable for conviction of a DUI offense that involves injury to others varies dramatically among the circuits. The lack of uniformity results from the variations among the states' DUI statutes, as well as the different approaches within circuits in analyzing whether these DUI offenses constitute aggravated felonies. The lack of uniformity has been reinforced by the Board's decision in *Ramos*, in which it announced that the Board would no longer consider DUI offenses as crimes of violence under 18 U.S.C. § 16(b) in proceedings instituted in circuits that had not squarely addressed the issue. *Ramos*, 23 I. & N. Dec. at 347. Nevertheless, in cases arising in circuits that have addressed the issue, the Board has stated that it is bound to apply the law of the circuit. *Id.* at 346-47.

The result is disparate treatment of aliens among the courts of appeals, with the location of the removal proceeding determining the ultimate outcome. A stark example of the disparate treatment is presented by *Ursu v. INS*, 20 Fed. App. 702, 705, 2001 WL 1182409 at *2 (9th Cir. Oct. 5, 2001) (Pet. App. 16a-17a), in which the Ninth Circuit held that a conviction for DUI manslaughter under the Florida statute at issue in this case is not a crime of violence under 18 U.S.C. § 16. This decision is directly at odds with the Eleventh Circuit's position on the same Florida

statute in a case where death did not result from the DUI accident.

Petitioner was removed based on the aforementioned decisions by the BIA and the court of appeals that the Eleventh Circuit had decided that the DUI offense to which he pleaded guilty is a "crime of violence" under 18 U.S.C. § 16(a). To qualify as a "crime of violence" under § 16(a), an offense must have "as an element the use . . . of physical force against the person or property of another." 18 U.S.C. § 16(a) (2002). Although there is no precedent from this Court interpreting § 16 (either subsection (a) or (b)) in any context,[1] for the reasons set forth below, state statutes such as the Florida statute under which petitioner was convicted do not meet § 16(a)'s requirements.

First, the Florida statute does not require the intentional (or even reckless) application of physical force against another, and thus does not involve the "use of physical force against" another. Second, § 16(a) clearly provides that a "crime of violence" must involve some application of physical force against the person or property of another. State DUI laws, such as the Florida statute at issue in this case, that require the causation of injury for conviction but do not specify that they involve the use of physical force against another do not satisfy this

[1] In addition to being incorporated into the definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43), the term "crime of violence" in § 16 is incorporated in numerous federal statutes unrelated to immigration. *See, e.g.*, 2 U.S.C. § 1961 (2002) (providing, among other things, that the Capitol Police may make "arrests within the District of Columbia for crimes of violence, as defined in section 16 of title 18, committed within the Capitol Buildings and Grounds . . . "); 18 U.S.C. § 931 (2002) prohibiting the possession of body armor by persons who have committed felony crimes of violence as defined by § 16); 18 U.S.C. § 1956 (2002) (outlawing the laundering of money that represents the proceeds of unlawful activities, including crimes of violence as defined in § 16).

requirement. Therefore, a conviction under Fla. Stat. § 316.193(3)(c)(2) (or other statutes that do not require the application of physical force against another) is not a "crime of violence" under 18 U.S.C. § 16(a).

In advancing these arguments, petitioner recognizes and appreciates the seriousness of DUI-related offenses. As the Seventh Circuit noted in *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001), which involved a conviction for *homicide* involving DUI:

> Our decision [that DUI offenses, including homicide involving DUI, are not "crimes of violence"] does not minimize the seriousness of crimes involving drunk driving. There is no question that drunk driving exacts a high societal toll in the forms of death, injury and property damage. This fact does not, however, change our observation . . . that a drunk driving accident is not the result of plan, direction, or purpose, but of recklessness at worst and misfortune at best.

Id. at 612 (internal quotation marks and citations omitted).

A. A DUI With Serious Bodily Injury Offense That Does Not Require the Intentional Use of Force Against the Person or Property of Another is Not a Crime of Violence Under § 16(a)

State DUI statutes such as Fla. Stat. § 319.163(3)(c)(2) do not meet § 16(a)'s requirement that physical force be "used" against another's person or property. Specifically, any application of physical force that may be required for conviction under a state statute like Fla. Stat. § 319.163(3)(c)(2) is not "used" against the victim as that word is ordinarily and commonly understood. The word "use" means intentional availment, *United States v.*

Rutherford, 54 F.3d 370, 372-73 (7th Cir. 1995), *cert. denied*, 516 U.S. 924 (1995), or an intentional application of force, *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) *reh'g denied by* 262 F.3d 479 (5th Cir. 2001). Statutes such as Fla. Stat. § 319.163(3)(c)(2) do not require proof of the intentional application of force against other; rather, the unintentional, negligent and/or accidental application of force is sufficient.[2]

Petitioner was convicted of DUI with serious bodily injury under Fla. Stat. § 319.163(3)(c)(2), which includes a requirement of causation, but does not require the intentional, or even reckless, application of physical force against the person or property of another. It does not even require a showing of negligence as an element. See *State v. Hubbard*, 751 So. 2d 552, 564 (Fla. 1999) (no free-standing element of negligence separate and apart from the causation element). Therefore, because the everyday, commonsense meaning of the term "use" connotes intentional conduct, Fla. Stat. § 319.163(3)(c)(2) (and other state DUI statutes that do not require intentional application of force for conviction) are not "crimes of violence" under § 16(a); they do not involve the "use" of physical force against the person or property of another.

[2] As discussed in detail in Section I.B., *infra*, even if the Court were to conclude that the unintentional, accidental or negligent application of force satisfies § 16(a)'s "use against" requirement, Fla. Stat. § 316.193(3)(c)(2) still would not qualify as a "crime of violence" because the statute does not require *any* application of force (whether accidentally, negligently or intentionally) for conviction. Therefore, it does not have as "an element" any application of force against another, regardless of the *mens rea* this Court believes § 16 requires be associated with the force.

1. The Plain and Ordinary Meaning of "Use" Requires Intentional Application or Availment of Force

Interpreting the phrase "use . . . of physical force against," begins, of course, with the language of the statute. *Bailey v. United States*, 516 U.S. 137, 144 (1995) (interpreting the word "use," and noting that "[w]e start, as we must, with the language of the statute"). Because "use" is not defined by the statute, a court "normally construe[s] it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). As set forth below, the "ordinary and plain meaning" of "use" includes intent. As a result, the phrase "use . . . of physical force against" includes specific intent by the actor to use force against the person or property of another.

Dictionary definitions confirm that "use" includes intent. For example, Black's Law Dictionary defines the verb "use" as "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to carry out a purpose or action by means of; to put into action or service, especially to attain an end." *Black's Law Dictionary* 1541 (6th ed. 1990). Similarly, Webster's defines "use" to include "to employ for some purpose; put into service; make use of . . .to avail oneself of; apply to one's own purposes . . ." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 1573-74 (Deluxe ed. 1994).[3] These definitions

[3] Other definitions of "use" include:

- "[t]o put into service or apply for a purpose; employ. . . [t]o avail oneself of; practice. . . [t]o seek or achieve an end by means of." The *American Heritage Dictionary of the English Language* 1894 (4th Ed. 2000); and
- "to put into action or service: avail oneself of: EMPLOY . . . to carry out a purpose or action by means of: UTILIZE . . . USE implies availing

highlight the intentional aspect of the verb "use." For example, because "use" means "to employ for some purpose," or "to carry out a purpose or action by means of," or "to put into action or service, especially to attain an end" it would not make sense to "use" something unintentionally or accidentally. Having a "purpose" or attaining "an end" entails having an intent to accomplish something; not something done accidentally or unintentionally. Although the car of a drunk driver who hits another may hit with force, the driver does not *use* force to achieve some purpose or attain some end. The definitions clarify the plain and ordinary meaning of "use" as including an intent and purpose. Accordingly, the phrase "use . . . of physical force against the person or property of another" requires the intentional application of force to achieve some purpose. Accidental, negligent or unintentional applications of force do not satisfy this definition.

The definition of "use" to mean intentional availment or application is consistent with this Court's analysis of the word in *Bailey* and *Smith*. Both cases involved the interpretation of the phrase "use of a firearm" in 18 U.S.C. § 924(c)(1). In *Smith*, the Court looked to various dictionary definitions of "use" and concluded that "use" includes intentionally employing a firearm by attempting to trade or barter it for drugs. 508 U.S. at 228-29. In doing so, the Court explained that "over 100 years ago we gave the word 'use' the same gloss, indicating that it means 'to employ' or 'to derive service from.'" *Id.* (quoting *Astor v. Merritt*, 111 U.S. 202, 213 (1884) (internal quotation marks omitted). Similarly, in *Bailey*, the Court concluded that "'use' impl[ies] action and implementation" and held that the government "must show active employment of [a] firearm"

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oneself of something as a means or instrument to an end." *Merriam-Webster Collegiate Dictionary* 1378 (11th Ed. 2003)

to establish a violation of § 924(c)(1). 516 U.S. at 144-45. In so doing, this Court in *Bailey* relied on *Smith*'s definitions of "use." *Id.* at 145.

Moreover, § 16(a) encompasses "threatened" and "attempted" use of force. 18 U.S.C. § 16(a). These terms, like "use" itself, necessarily require intent. *See Black's Law Dictionary* 127, 1480 (6th ed. 1990); *United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc), *cert. denied*, 124 S.Ct. 1728 (2004) (holding that a sentencing guideline with the same "use . . . of physical force" language requires intentional application of force). As the Fifth Circuit observed in *Vargas-Duran*, interpreting the term "use" without an intent requirement would skew the meanings of the adjacent statutory terms, "attempted use" and "threatened use," both of which clearly are intentional acts:

> Were we to interpret "use of force" inconsistently with its plain meaning -- that is, as capable of being performed without intent -- we would effectively nullify the state of mind required by "attempted use" and "threatened use." For how could one intentionally attempt to unintentionally use force, or intentionally threaten to unintentionally use force?

356 F.3d at 603.

2. The Majority of Circuits That Have Interpreted "Use" Conclude That it Means Intentional Application or Availment of Force

The plain meaning of § 16(a) establishes that a crime of violence requires more than the accidental or negligent application of force against another. The majority of circuits that have considered whether intoxication offenses qualify as crimes of violence under § 16(a)'s "use . . . against" formulation (or under § 16(b)'s similar "use" requirement) have concluded they do not because an offense that has as an element the use, attempted use or threatened use of physical of force requires the intentional application of force against someone, not the mere accidental application of force that occurs in a DUI offense.

a. Section 16(a) Cases. The Seventh Circuit observed that the terminology of § 16(a) requiring the "use. . . . of physical force against" is not an apt description of drunk driving or its consequences. In *Rutherford*, the court explained that referring to drunk driving as a "use of force" would contort the plain meaning of the terms:

> Referring to a randomly occurring avalanche as a "use" of force would torture the English language. . . . A drunk driver who injures a pedestrian would not describe the incident by saying he "used" his car to hurt someone. In ordinary English, the word "use" implies intentional availment. No availment of force in order to achieve an end is present in a drunk driving accident.

54 F.3d at 372-73 (footnote omitted). Later in *Bazan-Reyes*, the Seventh Circuit held that even a conviction for DUI homicide does not satisfy § 16(a), because "the word 'use' requires volitional conduct" and "[a]lthough a conviction for

homicide by intoxicated use of a vehicle requires that the offender actually hit someone, it does not require that he *intentionally* used force to achieve that result." 256 F.3d at 609 (emphasis added). Thus, the court concluded that "our finding that the word 'use' requires volitional conduct prohibits a finding that drunk driving is a crime of violence under § 16(a)." *Id.*

In *Vargas-Duran*, the Fifth Circuit considered whether an individual convicted of intoxication assault under a Texas statute should receive a sentence enhancement under a provision of the Sentencing Guidelines that applies when the predicate offense involves "as an element the use, attempted use, or threatened use of physical force against the person of another." United States Sentencing Commission, *Guidelines Manual*, § 2L1.2 (2003) comment (n. 1(B)(iii)). This Sentencing Guideline uses the same operative language as the definition of a crime of violence under § 16(a). The underlying criminal offense required that the individual had caused serious bodily injury to another "by accident or mistake...while operating... [a] motor vehicle in a public place while intoxicated." Tex. Penal Code Ann. § 49.07 (1994). As with Fla. Stat. 316.193(3)(c)(2), the Texas statute at issue in *Vargas-Duran* required that serious bodily injury occur to another, but did not include a *mens rea* requirement.

The Fifth Circuit, en banc, agreed with Vargas-Duran's position that the sentencing enhancement applied only if the offense involved the intentional application of force, whereas the underlying criminal offense only required injury to another caused "by accident or mistake" and thus did not require as an element the intentional application of force. *Vargas-Duran*, 356 F.3d at 605. The court of appeals based its decision on the plain meaning of the word "use." Referring both to Black's Law Dictionary and general dictionaries of English usage including the Oxford English

Dictionary and Webster's, the court noted that definitions of the term "use" include the application or employment of something for a purpose or to achieve an end. *Id.* at 602-03. The mere application of force against the person of another does not necessarily mean that the application was intentional, and the court concluded that the "use of force" requires intent. "Because we conclude that the meaning of 'use of force' is free of ambiguity, we therefore hold that the plain meaning of the word 'use' requires intent." *Id.* at 603.[4]

b. Section 16(b) cases. As noted, petitioner was removed based on the court of appeals' conclusion that his offense constituted a crime of violence under § 16(a). Given the similarity of the critical language between §16(a) and §16(b), however, decisions addressing whether § 16(b) applies to DUI offenses further support an interpretation of the term "use" in a way that applies to offenses involving the intentional application of force, but not to those that involve accidental or negligent application of force. *See Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorensen v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986))) (internal quotations omitted); *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993).

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[4] The Ninth Circuit also concluded that DUI causing injury to another under California law is not a "crime of violence" under § 16(a) or § 16(b), but it did not interpret the word "use" to require intent. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001). Rather, the court interpreted "use" to require "volitional" conduct, with a *mens rea* of at least recklessness. Petitioner's offense would not constitute a "crime of violence" even using the Ninth Circuit's lower standard because it does not even require a *mens rea* of negligence.

By its terms, § 16(b) may apply to a broader range of conduct than §16(a).[5] However, both subsections contain the same language that is critical to determining whether offenses that involve the unintentional or accidental application of force against another qualify as "crimes of violence." Section 16(a) requires that an offense have "as an element the use . . . of physical force against the person or property of another," and § 16(b) requires that an offense "involve[] a substantial risk that physical force against the person or property of another may be used. . . ." Both subsections contain the "use of physical force against . . . another" formulation that supports the conclusion that offenses without a *mens rea* of intent do not constitute "crimes of violence." *See Bazan-Reyes*, 256 F.3d at 608-12 (treating "use" the same under both § 16(a) and § 16(b) and holding that DUI homicide is not a "crime of violence" under either subsection); *see also Ramos*, 23 I & N Dec. at 346 (stating that the majority of courts addressing the issue have "declined to differentiate between the terms 'use' and 'may be used,'" for purposes of § 16(a) and § 16(b), respectively). As concurring Board members Pauley and Scialabba recognized in *Ramos*, because both § 16(a) and § 16(b) require the "use[]" of "physical force" for a conviction to qualify as a "crime of violence," "it would be a strange jurisprudence to find that Congress intended a different meaning for the same words in the two [subsections]" of § 16. *Id.* at 350 n.2 (Pauley, concurring, joined by Scialabba). Because "use" should be interpreted similarly to require intent in § 16(a) and § 16(b), petitioner's conviction does not qualify as a "crime of violence" under either subsection of § 16 because his offense did not require

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[5] The broader applicability of § 16(b) stems, in large part, from the fact that the "use of physical force" must be "an element" of an offense to qualify under § 16(a), whereas § 16(b) only requires that the offense, "by its nature, involves a substantial risk" that "physical force . . . may be used in the course of committing the offense."

(or present a substantial risk) that he intentionally apply force against the car accident victims.

Courts considering DUI and other offenses that involve injury or death have understandably reached the conclusion that such offenses are not "crimes of violence" under § 16(b) because they do not involve risk that physical force may be *intentionally* (or at least recklessly) used against another. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367, 374 (2d Cir. 2003) (second degree manslaughter for recklessly causing the death of another is not a crime of violence under § 16(b)); *Bazan-Reyes*, 256 F.3d at 611 (holding that DUI *homicide* is not a "crime of violence" under either § 16(a) or § 16(b) and noting that "the language of § 16(b) simply does not support a finding that a risk that one object will apply force to another is enough to constitute a crime of violence . . . § 16(b) only applies when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property." (internal quotation omitted and emphasis added)); *Trinidad-Aquino*, 259 F.3d at 1145-46 (holding that DUI with serious bodily injury is not a "crime of violence" under § 16(a) or § 16(b) but adopting a recklessness *mens rea* standard); *but see Omar v. INS*, 298 F.3d 710, 715-18 (8th Cir. 2002).[6]

[6] In *Omar*, the Eighth Circuit held that a conviction for vehicular homicide under Minnesota law constituted a crime of violence under § 16(b). 298 F.3d at 720. The court discussed whether "use" requires intentional application of force (and concluded it did not), but it conducted no statutory analysis of the word "use" and, instead, focused on the risk of harm inherent in DUI offenses. By focusing on the fact that criminal vehicular homicide "always result[s] in another's death," (in *Omar*, unlike this case, two people died), the court improperly "equate[d] the phrase 'risk that physical force may be used' with language Congress did not employ in § 16(b), 'risk that injury may occur.'" *Id.* at 722 (Heaney, C.J., dissenting).

Similarly, the Sixth Circuit has held that DUI homicide is a "crime of violence" under § 16(a) and § 16(b) and the Tenth Circuit has held that

In *Jobson*, the Second Circuit relied on its previous holding in *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001), and reinforced its view "that the verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) contemplates only intentional conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ force." 326 F.3d at 373 (citations and internal quotations omitted). The court concluded that:

> a defendant must, in pursuing his intended criminal activity, risk having to *intentionally use force* to commit the offense. By contrast, a defendant who is convicted of second-degree manslaughter, like other offenses of pure recklessness, may lack any "intent, desire, or willingness to use force or cause harm at all."

Id. at 374 (quoting *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)) (emphasis added).

Courts have also focused on the plain meaning of "use" as requiring intent in ruling that DUI offenses not involving injury do not satisfy § 16(b). *Dalton*, 257 F.3d at 206-07; *United States v. Chapa-Garza*, 243 F.3d 921, 926-27 (5th Cir. 2001), *reh'g denied by* 262 F.3d 479 (5th Cir. 2001); *see also United States v. Lucio-Lucio*, 347 F.3d 1202, 1204-07 (10th Cir. 2003) (not focusing on the word "use," but

DUI is a "crime of violence" under § 16(b). *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *United States v. Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (unpublished table decision). As with the Eleventh Circuit's decision in *Le*, neither court engaged in any statutory construction involving the interpretation of the "use against" formulation. Instead, both courts improperly focused on the "risk of physical injury" standard found in other statutes (but not § 16) rather than § 16's "use of physical force" standard.

considering the plain meaning of all of § 16(b), as well as § 16's legislative history, to conclude that DUI does not satisfy § 16(b) because it does not involve intentional acts of violence). *But see Ramos*, 23 I. & N. Dec. at 345 (announcing that DUI will not be considered a "crime of violence" under § 16(b) unless the offense has a *mens rea* of at least recklessness).

In *Chapa-Garza*, for example, the Fifth Circuit focused on the dictionary definition of the verb "use," and noted that the definitions "indicate that 'use' refers to volitional, purposeful, not accidental, employment of whatever is being 'used.'" 243 F.3d at 926. It rightly concluded that "[t]he criterion that the defendant use physical force against the person or property of another is most reasonably read to refer to intentional conduct, not an accidental unintended event." *Id.* The court made the important distinction between the application of force and the resulting injury:

> While the victim of a drunk driver may sustain physical injury from physical force being applied to his body as a result of collision with the drunk driver's errant automobile, it is clear that such force has not been intentionally "used" against the other person by the drunk driver at all. . . .

Id. at 927. Section 16(b) applies, the court concluded, when there is a "substantial likelihood that the offender will intentionally employ physical force against the person or property of another in order to effectuate the commission of the offense." *Id.* at 926.

Similarly, the Second Circuit in *Dalton* concluded that DUI does not satisfy §16(b). In doing so, *Dalton* confirmed the commonsense, everyday understanding that although accidents involve force they do not include the "use" of force:

> [T]he language of § 16(b) fails to capture the nature of the risk inherent in drunk driving. This risk is, notoriously, the risk of an ensuing accident; it is not the risk that the driver will "use physical force" in the course of driving the vehicle... [A]n accident, by definition, is something that is neither planned nor foreseen -- except perhaps in hindsight. Although an accident may properly be said to involve force, one cannot be said to use force in an accident as one might use force to pry open a heavy, jammed door.

257 F.3d at 206.

These cases interpreting the substantially similar operative language of § 16(b) support the conclusion that the plain meaning of the phrase "use . . . of physical force against" in § 16(a) requires that the elements of the offense include the intentional application of force against the person of property of another. An unintentional or accidental application of force does not suffice for a crime of violence.

Petitioner's offense, like, for example, those at issue in *Bazan-Reyes* and *Vargas-Duran*, does not have as "an element" the intentional application of force. Indeed, it has no *mens rea* requirement at all. *Hubbard*, 751 So. 2d at 564. Rather, it simply requires a causal connection between the offender's intoxicated use of a vehicle and bodily injury to another. Because the "use of physical force against another" required by § 16(a) does require that the use of force is intentional, petitioner's offense under Fla. Stat, § 316.193 cannot be considered a crime of violence under § 16(a).

B. A DUI With Serious Bodily Injury Offense Does Not Necessarily Have as "An Element" the Use, Attempted Use or Threatened Use of Physical Force Against the Person or Property of Another.

1. The Eleventh Circuit in *Le*, and by Extension in this Case, Improperly Assumed that a Crime That Has an Element of "Causation of Physical Injury" Implicitly Has an Element of "Use of Physical Force."

An offense that has an element of "causing injury" to another does not necessarily require proof that physical force was applied to cause such injury. Therefore, offenses such as Fla. Stat. § 319.163(3)(c)(2), which require the causation of injury to another, but do not have as an element the application of any force (accidentally, negligently, intentionally or otherwise) against the person of another, are not crimes of violence under § 16(a).

The court of appeals concluded that petitioner had been convicted of an aggravated felony based on another panel's earlier decision in *Le*. J.A. 115-17. The Eleventh Circuit's determination that DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) has "as an element" the use of physical force against another did not properly reflect the Florida statute's requirements. The plain meaning of "an element" of an offense, combined with the statutory elements of the Fla. Stat. § 316.193(3)(c)(2), demonstrate that the application of force (whether intentional or not) was not a required element for petitioner's conviction.

The court of appeals in *Le* affirmed the reasonableness of the Board's conclusion that a conviction for DUI with serious bodily injury is a crime of violence under 18 U.S.C. § 16(a). *Le v. Attorney General*, 196 F.3d

1352, 1354 (11th Cir. 1999) (per curiam). It did so because, in the court of appeals' view, the use of force is an element under Fla. Stat. § 316.193(3). *Id.* The court observed that there are two elements to the offense under Florida law: (1) the defendant operated a vehicle while under the influence; and (2) as a result of such operation he caused serious bodily injury to another. *Id.* It then concluded, without explanation, that the Florida statute meets the definition of a crime of violence under § 16(a), because serious bodily injury is an element of offense. *Id.*

In reaching its decision, the court of appeals did not refer to the language of § 16(a) which requires that the offense "has as an element the use, attempted use or threatened use of physical force against the person or property of another" in order to qualify as a "crime of violence." Rather, the court observed that "*serious bodily injury is included as an element of this offense.* Consequently, Mr. Le's conviction for driving under the influence with serious bodily injury satisfies the definition of a crime of violence under section 16(a) of Title 18 *because one element includes the actual use of physical force.*" *Le*, 196 F.3d at 1354 (emphasis added).

This conclusion misses the distinction that the occurrence of serious bodily injury is not a criterion of a crime of violence under 18 U.S.C. § 16(a), but the "use of physical force against . . . another" is. The conclusion appears to rest on an erroneous assumption that any crime that requires proof of "serious bodily injury" necessarily involves the "use of physical force."

2. Fla. Stat. § 316.193(3)(c)(2) Requires Proof of Causing Serious Bodily Injury to Another, But Does Not Require Proof of the Use of Physical Force

The plain language of Fla. Stat. § 316.193(3)(c)(2) provides that causing serious bodily injury is an essential element of the offense, but that is not the relevant inquiry under 18 U.S.C. § 16(a). The relevant inquiry is whether the offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" Against the correct standard, the plain language of the statute indicates that the Florida DUI offense does not have the requisite element for a crime of violence under § 16(a). The text of § 316.193(3)(c)(2) makes clear that the "use . . . of physical force against the person or property of another" required by § 16(a) is not an element of the offense.

The elements of a crime are "those constituent parts of a crime that must be proved by the prosecution to sustain a conviction." *Black's Law Dictionary* 520 (6th ed. 1990). Rather than considering the circumstances that resulted in the conviction in a particular case, the elements of an offense are the minimum that must be proved to support a conviction. Thus the use of physical force against the person or property of another is an element of the offense if it is legally required in order to obtain a conviction under the Florida DUI statute. *See, e.g. Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (classification of state criminal offense for purposes of § 16(a) begins and ends with the elements of the crime); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 192 (2d Cir. 2003) ("An element of a crime is a fact that must be proven beyond a reasonable doubt to obtain a conviction."); *see also Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) ("§ 16(a) is narrowly drawn to include only crimes whose elements require the use, attempted use, or

threatened use of physical force"); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546-47 (11th Cir. 1990) (analysis of a crime under § 16(a) is a legal rather than a factual inquiry which should focus on the statute that defines the offense rather than the particular conduct of the defendant). As discussed below, proof that a defendant "used physical force against the person or property of another" is not required for conviction under Fla. Stat. 316.193(3)(c)(2).

In *Dalton*, the Second Circuit reviewed an order of removal based on a DUI conviction under a New York statute. In considering whether the DUI offense constituted a crime of violence under 18 U.S.C. § 16(b) the court stated:

> [I]n the context of driving a vehicle, it is unclear what constitutes the "use of physical force." The physical force used cannot reasonably be interpreted as a foot on the accelerator or a hand on the steering wheel. Otherwise, all driving would, by definition, involve the use of force, and it is hard to believe that Congress intended for all felonies that involve driving to be "crimes of violence."

257 F.3d at 206.

The enumerated subsections of Fla. Stat. § 316.193(3)(c) do not require that the person charged with the offense "use[d], attempted [to] use, or threatened [to] use . . . physical force against the person or property of another." Accordingly, in order to obtain a conviction for DUI with serious bodily injury, a Florida prosecutor need not specifically prove that an individual charged with DUI with serious bodily injury used, attempted to use or threatened to use physical force against another. The court of appeals in *Le*, and by extension in this case, ignored the plain meaning of an "element" and apparently assumed that any physical

injury must be caused by the use of physical force and that serious bodily injury cannot occur without the "use . . . of physical force against the person or property of another." *Le,* 196 F.3d at 1354 (concluding that because "serious bodily injury" is an element of the Florida offense, the offense also includes an element of "the actual use of force."). In doing so, the Eleventh Circuit improperly substituted a *consequence* of the use of force (serious bodily injury), for § 16(a)'s requirement that the offense "has as an element" the use of force against another. This position incorrectly assumes that "causation of injury" must always include the "use of force," and should be rejected.

Even if a typical DUI with injury charge may follow an accident involving an intoxicated driver whose vehicle hits another vehicle, the required elements of such an offense do not necessarily involve that scenario. In fact, other plausible situations exist where physical injury is caused by the operation of a vehicle by an intoxicated driver, without the use of any physical force whatsoever by the intoxicated driver. Judge Clement of the Fifth Circuit highlighted some of these possibilities in her dissent from the original Fifth Circuit panel opinion in *Vargas-Duran*. In discussing how a Texas intoxication assault statute (which, like Fla. Stat. § 316.193(3)(c)(2), only required intoxication, operation of a motor vehicle and causation of serious bodily injury for conviction) could be violated without any application of force whatsoever, Judge Clement observed:

> For instance, if a drunk driver swerves off the road, causing a pedestrian to dive into a ditch and become seriously injured, the Texas statute is doubtlessly violated, even though there has been no actual application of force to anyone. Consider also the case where a drunk driver's near miss causes a heart attack.

United States v. Vargas-Duran, 319 F.3d 194, 204 (Clement, J., dissenting), *vacated by* 356 F.3d 598 (5th Cir. 2004);[7] *see also Chrzanoski,* 327 F.3d at 195 (individual guilty of third degree assault under Connecticut statute that requires intent to cause physical injury, did not commit a crime of violence under § 16(a) because intentional causation of injury does not necessarily involve the use of force; noting that "[g]iven the elements of [the Connecticut statute], it seems an individual could be convicted for intentional assault . . . for injury caused not by physical force, but by guile, deception or even deliberate omission").

Causing injury without applying any physical force is more than a mere possibility under various state laws, including Florida's. *See, e.g., Barrington v. State*, 145 Fla. 61, 65-66 (1940) (upholding conviction for DUI manslaughter prior to codification of Fla. Stat. § 316.193(3), where the victim's car ran into the intoxicated defendant's parked car, which the defendant had stopped in the right lane of a highway and which was not moving at the time of the accident). The *Barrington* case exemplifies the difference between causing serious bodily injury and using physical force against the person or property of another. The defendant caused serious injury to the passenger of another car (resulting in death) by the operation of his vehicle while intoxicated, but without using physical force against that

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[7] Judge Clement wrote the majority opinion in the en banc *Vargas-Duran* decision where she reiterated that:

> the fact that the statute requires that serious bodily injury result from the operation of a motor vehicle by an intoxicated person does not mean that the statute requires that the defendant have used the force that caused the injury. . . . There is . . . a difference between a defendant's causation of injury and the defendant's use of force.

356 F.3d at 606.

person. Although the case did not discuss the statutory offense in this case, the elements of Fla. Stat. § 316.193(3)(c)(2) clearly would have been satisfied. That offense would not qualify as a crime of violence under § 16(a), however, because the defendant did not use, threaten to use, or attempt to use physical force against the person who died in the accident.

3. Cases Interpreting 18 U.S.C. § 16(b) Reinforce That "Causing Serious Bodily Injury" is Different Than "Using Physical Force"

Although the Eleventh Circuit deemed petitioner's underlying offense a crime of violence only under § 16(a), case law applying § 16(b) reinforces the conclusion that an offense that has an element the causation of physical injury (such as Fla. Stat. § 316.193(3)(c)), does not necessarily also have as an element, implicitly or by definition, "the use . . . of physical force against the person or property of another." These cases delineate the important distinction between causing injury and using force.

In concluding that DUI and other offenses (with or without resulting injury) do not qualify as "crimes of violence" under § 16(b), courts of appeals have compared the language of § 16(b) with the provision of one of the Sentencing Guidelines, USSG § 4B1.2(a)(2), which provides for a sixteen-level enhancement if the defendant has been convicted of a "crime of violence."[8] These cases do not address the "force as an element" requirement, but the

[8] Prior to November 1, 1989, the guideline and § 16 were identical because the guideline simply incorporated by reference the definition of "crime of violence" in § 16. United States Sentencing Commission, *Guidelines Manual* § 4B1.2(1) (1988). The guideline was amended effective November 1, 1989 to provide its own definition. USSG § 4B1.2(1) (1989).

distinction they draw between § 16(b) and USSG § 4B1.2(a)(2) highlights the distinction between the use of force, and the causation of injury. *See Jobson*, 326 F.3d at 373 n.5; *Dalton*, 257 F.3d at 207-08; *Bazan-Reyes*, 256 F.3d at 607-611; *Chapa-Garza*, 243 F.3d at 924-26; *cf. United States v. Parson*, 955 F.2d 858, 864-66 (3d Cir. 1992) (interpreting § 4B1.2(1) of the Sentencing Guidelines and contrasting its "risk of injury" language with, among other things, § 16(b)'s "risk of physical force" language). The guideline provides that:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (1) has an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*[9]

USSG § 4B1.2(a) (emphasis added).

The language of USSG § 4B1.2(a)(1) is almost identical to § 16(a), but the second part of the guideline differs substantively from § 16(b). Section 16(b) covers offenses that "involve[] a substantial risk that physical force against the person or property of another may be used . . . ," whereas the enhancement provided by § 4B1.2(a)(2) covers offenses that "otherwise involve[] conduct that present[] a serious potential risk of physical injury to another." Courts have noted the important distinction between "risk that

[9] Sentencing guideline § 4B1 was renumbered in 1997. *See* USSG App. C at 416 (1997). Section 4B1.2(a)(1) used to be § 4B1.2(1)(i) and § 4B1.2(a)(2) used to be § 4B1.2(1)(ii). The cases refer to both versions of this guideline.

physical force may be used" and the "risk of physical injury" in applying § 16(b).[10] This established and commonsense distinction between conduct and effect explains why DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) (and other state DUI statutes that only require causation of injury for conviction) are not "crimes of violence" under § 16(a) because they do not have as "an element" the "use of physical force," although they do have as an element a specific effect, *i.e.*, serious bodily injury.

The importance of recognizing the distinction between the "risk of physical injury" in the guideline and the "risk that physical force may be used" is highlighted by the

[10] *See, e.g.*, *Dalton*, 257 F.3d at 207-08 (holding that DUI is not a "crime of violence" under § 16(b), rejecting the government's argument that "the difference, if any, between a 'risk of injury' and a risk of the 'use of physical force' is negligible" and concluding that the Sentencing Commission broadened the definition of "crime of violence" by revising the guideline to refer to "risk of injury"); *Bazan-Reyes*, 256 F.3d at 609-11 (rejecting the government's argument that § 16(b) and guideline 4B1.2(a)(2) should be interpreted similarly because "[t]he combination of the phrases 'physical force,' 'may be used,' and 'in the course of committing the offense' . . . is a material difference between the two definitions that requires § 16(b) to be interpreted to exclude felony DWI [including DWI resulting in death] from the definition of crime of violence."); *Chapa-Garza*, 243 F.3d at 925 (rejecting a government argument similar to that presented in *Dalton* and noting that guideline § 4B1.2(a)(2)'s "'otherwise' clause concerns only the risk of one particular effect (physical injury to another's person or property) of the defendant's conduct. Section 16(b) is focused on the defendant's conduct itself, as there is no requirement that there be a substantial risk that another's person or property will sustain injury"); *see also Lucio-Lucio*, 347 F.3d at 1207; *Parson*, 955 F.2d at 865-66 (analyzing the sentencing guideline, but contrasting it with § 16(b)). Each of these cases involves a comparison of § 16(b) to § 4B1.2(a)(2) of the Sentencing Guidelines. Of course, both of these subsections are framed in terms of offenses that involve "substantial risk" of either physical injury or use of physical force. However, because § 16(a) also contains the "use of physical force" requirement, the contrast drawn in these cases between causing injury and using force applies equally to that section.

fact that courts other than *Le* that have ruled that DUI offenses (those with or without injury or death) are crimes of violence under § 16 have failed to make this important distinction. *See Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *United States v. Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (unpublished table decision) (Pet. App. 5a-12a).[11]

In *Tapia-Garcia*, the Tenth Circuit held that DUI satisfies § 16(b). In doing so, the court focused on the risk of injury inherent in DUI offenses, and relied on cases applying the Sentencing Guidelines' "risk of physical injury" standard and the erroneous premise that "the language of [this] Guideline provision, USSG § 4B1.2, is similar to that of 18 U.S.C. § 16(b)." 237 F.3d at 1222. Similarly, the Sixth Circuit concluded that DUI resulting in the death of another under Indiana law qualified as a crime of violence under both § 16(a) and § 16(b). *Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 at *2-3 (Pet. App. 8a-10a). The court conducted no analysis of § 16's "use against" formulation. Instead, the court relied on cases that held that vehicular manslaughter and/or DUI offenses qualified as either "crimes of violence" under § 4B1.2(a)(ii) of the Sentencing Guidelines or "violent felonies" under 18 U.S.C. § 924(e)(2)(B)(ii), provisions that only require a substantial risk of injury to others, not the use of force against others. *Id.*[12]

[11] As explained in footnote 6, *supra*, the court in *Omar* concluded that "use" does not require intent without conducting any statutory construction of the word "use" and by inappropriately equating "use of force" with "risk of injury."

[12] Four of the cases cited in *Santana-Garcia* relied on § 4B1.2(1)(ii) in concluding that the offense in question was a crime of violence. The fifth case applied § 924(e)(2)(B)(ii) which defines "violent felony" with the same definition used for "crime of violence" in § 4B1.2(a)(ii) of the Sentencing Guidelines.

For the reasons set forth above, even though the offense of DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) explicitly has "as an element" that the offender *causes injury* to another, it does not have "as an element" a requirement that physical force be "*used*" "against the person . . . of another."

II. CONGRESS ADDED "CRIMES OF VIOLENCE" TO THE LIST OF AGGRAVATED FELONIES WITHIN A STATUTORY FRAMEWORK THAT DISTINGUISHED DUI OFFENSES INVOLVING INJURY FROM "CRIMES OF VIOLENCE"

The structure of § 101 of the INA also demonstrates that "crimes of violence" do not include DUI offenses (including those that result in injury to others). 8 U.S.C. § 1101 (2002). As noted previously, § 101(A)(43) of the INA (8 U.S.C. § 1101(a)(43)) lists the "aggravated felonies" for which an alien can be deported and provides that one of them is a "crime of violence" as defined in 18 U.S.C. § 16. Another subsection of § 1101 lists the "serious criminal offenses" that can render inadmissible an alien who has asserted diplomatic immunity to prosecution for such an offense. 8 U.S.C. § 1101(h). In February 1990, Congress passed the Foreign Relations Authorization Act which specifies the disqualifying "serious criminal offenses" in § 1101(h). Pub. L. No. 101-246 § 131, 104 Stat. 15, 31 (1990). That provision lists, as separate offenses, "crimes of violence" as defined in 18 U.S.C. § 16 and crimes of DUI resulting in injury to another person:

> For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of Title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(h).

This listing of both "crimes of violence" and DUI resulting in injury in the same provision is critical. Because courts have the duty "to give effect, if possible, to every clause and word of a statute," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted), and Congress is presumed not to include superfluous words in statutory text, the text of § 1101(h) demonstrates that, as of February 1990, Congress believed that DUI offenses that cause injury are not within "crimes of violence" defined in 18 U.S.C. § 16.[13]

Moreover, at the time § 1101(h) was enacted, the definition of aggravated felony did not include a reference to "crimes of violence" as defined in 18 U.S.C. § 16. It was not until nine months after the enactment of § 1101(h), which distinguishes DUI offenses involving injury from "crimes of violence" defined in § 16, that Congress amended the definition of aggravated felonies in § 1101(a)(43) to incorporate "crimes of violence" as defined by § 16 in § 1101(a)(43)(F). Immigration Act of 1990, Pub. L. No.

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[13] Congress' differentiation between "crimes of violence" and DUI offenses appears elsewhere. For example, 22 U.S.C. § 2728 (2002), which sets forth reporting requirements to Congress for crimes committed by diplomats, includes in its list of crimes that must be reported both "crimes of violence" as defined by § 16 and driving under the influence. This separate enumeration further illustrates that Congress understood that DUI offenses are not included in § 16.

101-649, § 501, 104 Stat. 4978, 5048 (1990). It is assumed that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Therefore, it must be presumed that Congress knew when it added § 1101(a)(43)(F) that DUI offenses were included affirmatively and separately from "crimes of violence" and are not subsumed within the term "crimes of violence."

The addition of § 1101(a)(43)(F) after the enactment of § 1101(h) demonstrates that Congress did not believe that DUI offenses (whether they include injury to others or not) were included within § 1101(a)(43)(F) by way of the incorporation of 18 U.S.C. § 16's definition of "crime of violence." This fact further buttresses the conclusion that is firmly established by § 16's plain meaning.

CONCLUSION

The order of the court of appeals should be vacated and the court of appeals should be directed to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

Respectfully submitted,

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RELEVANT STATUTORY PROVISIONS

The following statutory provisions are involved in this case.

1. Section 16 of Title 18 of the United States Code defines "crime of violence," and it provides:

> The term "crime of violence" means --
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

2. Section 101 of the INA defines the terms "serious criminal offense" and "aggravated felony," conviction for which makes an alien removable. Section 101 provides in pertinent part:

> (a) As used in this chapter--
>
> * * *
>
> (43) The term "aggravated felony" means--
>
> * * *
>
> (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;
>
> * * *

(h) For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--

(1) any felony;

(2) any crime of violence, as defined in section 16 of Title 18; or

(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(a)(43)(F);(h).

3. Section 1182 of Title 8 of the United States Code provides in pertinent part:

(a) Classes of aliens ineligible for visas or admission
Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

* * *

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien--
(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

8 U.S.C. § 1182(a)(2)(E).

4. Section 4B1.2 of the Federal Sentencing Guidelines reads:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG § 4B1.2.

5. Petitioner was convicted under Fla. Stat. § 316.193(3)(c)(2), which provides, in pertinent part:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:
>
> > (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;
> >
> > (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
> >
> > (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.
>
> * * *
>
> (3) Any person:
>
> (a) Who is in violation of subsection (1);
>
> (b) Who operates a vehicle; and
>
> (c) Who, by reason of such operation, causes:
>
> * * *
>
> > 2. Serious bodily injury to another, as defined in s. 316.193, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 316.193.

United States Court of Appeals, Sixth Circuit.
UNITED STATES OF AMERICA Plaintiff-Appellee,
v.
Ismael SANTANA-GARCIA Defendant-Appellant.
No. 98-2234.
April 18, 2000.

On Appeal from the United States District Court for the Western District of Michigan.

Before BOGGS and COLE, Circuit Judges, and ZATKOFF,* District Judge.

ZATKOFF, Chief District Judge.

***1** Ismael Santana-Garcia, a federal prisoner, appeals his sentence pursuant to 28 U.S.C. § 1291 (1993). Santana-Garcia was sentenced to ninety-two months imprisonment to be followed by thirty-six months of supervised release and a fine of $1500.00 after pleading guilty to reentry by a deported alien contrary to 8 U.S.C. § 1326 (1999). For the reasons stated below, we affirm Santana-Garcia's sentence.

I.

On August 11, 1994, while in the State of Indiana, defendant was involved in an automobile collision that resulted in the death of an elderly man. Defendant was operating the automobile with a blood alcohol level of .284 percent. On December 20, 1994, he was sentenced to six years incarceration, with two years suspended by an Indiana state court judge. Defendant was incarcerated at the Indiana State Farm in Greencastle from January 3, 1995 until

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* The Honorable Lawrence P. Zatkoff, United States Chief District Judge for the Eastern District of Michigan, sitting by designation.

September 17, 1996. Upon defendant's release from prison, deportation proceedings were initiated and he was deported by the INS on September 30, 1996. In October 1996, defendant illegally re-entered the United States and returned to Indiana.

On March 3, 1998, defendant was arrested by the Niles, Michigan Police Department and charged with operating a motor vehicle while under the influence of intoxicating liquor-second offense. It was later determined by the Niles Police Department that defendant was illegally present in this country. On June 1, 1998, a Complaint and Arrest Warrant were filed charging defendant with reentry by a deported alien contrary to 8 U.S.C. § 1326 (1999). On June 2, 1998, defendant was arraigned before a magistrate judge and was ordered detained pending a preliminary examination and detention hearing. On June 4, 1998, defendant waived the preliminary examination and detention hearing and was ordered held pending trial. On June 10, 1998, a one-count indictment was filed charging defendant with reentry by a deported alien contrary to 8 U.S.C. § 1326 (1999).

On July 7, 1998, defendant was arraigned on the indictment and pled guilty before a magistrate judge. On October 28, 1998, defendant appeared before the district judge, who accepted defendant's plea and held a sentencing hearing. Pursuant to U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A) (1998), the district court enhanced defendant's offense level by sixteen levels because defendant had been deported after a conviction for an aggravated felony. The district court reasoned that:

> Under section 2L1.2 of the guidelines, "aggravated felonies" include crimes listed under Title 8, United States Code, section 1101(a)(43). Since felony crimes of violence, as listed under 1101(a)(43) and [sic] since the *Farnsworth* Court[1] determined that negligent manslaughter caused by drunken driving was a felony crime of violence, the Court determines that the defendant ... has committed an aggravated felony and should receive the enhancement.

JA at 67-68 (footnote added). Thus, the district court found that operating a motor vehicle while intoxicated that resulted in the death of another person was an aggravated felony.

***2** Next, the district court declined to grant defendant a reduction for acceptance of responsibility because it determined that defendant had not demonstrated an affirmative acceptance of responsibility for his conduct. Therefore, the district court sentenced defendant to ninety-two months imprisonment to be followed by thirty-six months of supervised release and a fine of $1500.00.

II.

There are two issues presented on appeal before the Court. First, whether the District Court erred in determining that defendant's prior conviction for operating a motor vehicle while intoxicated resulting in the death of another person contrary to Indiana law was an aggravated felony under U.S.S.G. § 2L1.2. Second, whether the District Court erred when it denied defendant a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a).

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[1] *United States v. Farnsworth*, 92 F.3d 1001 (10 th Cir.1996)(finding that prior conviction for vehicular manslaughter was a "crime of violence" for purposes of enhancement under U.S.S.G. § 2K2.1).

This Court reviews a district court's factual findings in the application of the Sentencing Guidelines for clear error. *See United States v. Hamilton,* 929 F.2d 1126, 1130 (6th Cir.1991). The application of particular provisions of the Sentencing Guidelines to the facts as determined by the district court is a legal question and is reviewed de novo. See *United States v. Sanchez,* 928 F.2d 1450, 1458 (6 th Cir.1991).

First, defendant argues that operating a motor vehicle while intoxicated resulting in the death of another person is not an aggravated felony. U.S.S.G. § 2L1.2(b)(1)(A) provides that when sentencing a defendant who was previously deported after a criminal conviction, the district court must increase the base offense level by sixteen levels if the prior conviction was an aggravated felony. Application note one of § 2L1.2 directs the sentencing court to 8 U.S.C. § 1101(43) (1999) for the definition of aggravated felony. *See* U.S.S.G. § 2L1.2, comment (n.1). Section 1101(43)(F) defines the term "aggravated felony" as "a crime of violence (as defined in[18 U.S.C. § 16]) ... for which the term of imprisonment is at least one year." Title 18 defines "a crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
> 18 U.S.C. § 16 (West Supp.1999).

The 1994 Indiana statute defendant violated provides that a person who causes the death of another person when operating a motor vehicle while intoxicated commits a Class C felony.[2] Ind.Code Ann. § 9-30-5-5(a) (West 1994). This prior conviction is both "an offense that has an element the use ... of physical force against the person or property of another," *see* 18 U.S.C. § 16(a), and "an offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *see* 18 U.S.C. § 16(b); *see also, United States v. Sanders,* 97 F.3d 856 (6 th Cir.1996)(holding that the crime of involuntary manslaughter under Ohio law is a "violent felony" for purposes of 18 U.S.C. § 924(c)). *Cf. United States v. Farnsworth,* 92 F.3d 1001 (10 th Cir.1996)(concluding that driving under the influence of drugs or alcohol clearly was conduct that presented a serious potential risk of physical injury to another); *United States v. Rutherford,* 54 F.3d 370 (7th Cir.1995), *cert. denied,* 116 S.Ct. 323 (1995)(holding that vehicular assault by a drunk driver is a crime of violence); *United States v. Fry,* 51 F.3d 543 (5 th Cir.1995)(holding that causing the death of another while driving under the influence was clearly conduct that presented a serious potential risk of physical injury to another); *United States v. Payton,* 28 F.3d 17 (4 th Cir.1994)(holding that previous involuntary manslaughter conviction constituted a crime of violence), *cert. denied,* 115 S.Ct. 452 (1994).

***3** Thus, Santana-Garcia's drunk driving homicide meets the definition of a "crime of violence" under 8 U.S.C. § 1101(43), and is an aggravated felony for purposes of § 2L1.2(b)(1)(A). Therefore, we affirm the district court's

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[2] Additionally, Ind.Code Ann. § 35-50-1-2(12) (1998) defines a "crime of violence" to include "causing death when operating a motor vehicle."

enhancement of defendant's base offense level by sixteen levels pursuant to § 2L1.2(b)(1)(A).

Next, defendant argues that the District Court erred when it denied him a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). The district court's decision whether to grant a reduction for acceptance of responsibility is reviewed for clear error. *United States v. Corrigan,* 128 F.3d 330, 336 (6 th Cir.1997). "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." U.S.S.G. § 3E1.1, comment (n.5). Generally, the district court's conclusion that a defendant is not entitled to an adjustment for acceptance of responsibility is considered a question of fact that "normally enjoys the protection of the clearly erroneous standard, and will not be overturned unless it is without foundation." *United States v. Jeter,* 191 F.3d 637, 638 (6 th Cir.1999).

U.S.S.G. §§ 3E1.1(a) provides that "if the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." Commentary to § 3E1.1 provides:

> Entry of a plea of guilty prior to the commencement of the trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 ... will constitute significant evidence of acceptance of responsibility for the purposes of subsection(a). However, this evidence may be outweighed by conduct of the defendant

> that is inconsistent with such acceptance of responsibility. U.S.S.G. § 3E1.1, comment (n.3).

In this case, the presentence investigation report recommended declining defendant's request for an adjustment for acceptance of responsibility. The report stated that the totality of defendant's behavior was inconsistent with acceptance of responsibility as evidenced by the fact that defendant had entered the country illegally on three occasions and had not engaged in any post-conviction rehabilitative efforts. Additionally, the probation officer determined that defendant's contrition was for the benefit of the court, and was not sincere.

At the sentencing hearing, the court found that defendant had not accepted responsibility when defendant admitted that he was addicted to alcohol and he was not willing to do anything to help himself. Specifically, the Judge stated:

> But as I understand acceptance of responsibility to say, "It is my fault that I killed somebody a few years ago. It is my fault that I came back to the United States, even though times were hard. It is my fault that I drove a car drunk again, this time with a .17 reading, [.0]7 above the level that the state of Michigan has determined is drunk for the purposes of drunk driving, and it's unable for him to appreciate the difficulty--the relationship between the event of coming back illegally as an alien and drinking and driving. He doesn't see the connection. There is a connection, of course, and the connection is that it puts people of the

United States in direct jeopardy of him. So, he simply hasn't accepted responsibility.

***4** Defendant argues that he has tried to stop his abuse of alcohol. Additionally, defendant argues that after his motion for acceptance of responsibility was denied, he did demonstrate an acceptance of responsibility by stating that he was sorry for what he had did and wished that he could go back and change things.

We find that the facts and the lengthy sentencing hearing enabled the sentencing judge to be in the best position to evaluate the defendant's acceptance of responsibility. The district court properly found that defendant failed to comprehend the nexus between his being an illegal alien while repeatedly drinking and driving presents a serious potential risk of physical injury to other persons. This failure to understand the nexus is evidence of defendant's failure to accept responsibility for his offense. Therefore, there being no clear error, we affirm the district court's conclusion that defendant is not entitled to an adjustment for acceptance of responsibility.

III.

For the foregoing reasons, we AFFIRM Santana-Garcia's sentence.

United States Court of Appeals,
Ninth Circuit.
Daniel URSU, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE
Respondent.
No. 99-70678.
I & NS No. A29-388-188.
Submitted Sept. 14, 2001.*

Decided Oct. 5, 2001.

Alien petitioned for judicial review of order of Board of Immigration Appeals (BIA) affirming decision of immigration judge to order him removed. The Court of Appeals held that: (1) jurisdiction to review order of removal existed; (2) offense of driving under the influence (DUI)/manslaughter under Florida law is not "aggravated felony"; (3) alien's conviction for DUI/manslaughter was for "particularly serious crime," rendering alien ineligible for asylum and withholding of removal; and (4) Court of Appeals could not consider alien's estoppel argument.

Affirmed.

***703** On Petition for Review of an Order of the Board of Immigration Appeals.

Before KOZINSKI and GOULD, Circuit Judges, and SCHWARZER,** Senior District Judge.

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* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

** The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

*704 MEMORANDUM***

**1 Daniel Ursu appeals a final order of the Board of Immigration Appeals (BIA) affirming an Immigration Judge's (IJ) decision to order him removed to Romania. We affirm.

Because the parties are familiar with the facts and procedural history, we do not restate them here except as necessary to explain our disposition.

Ursu entered the United States on October 2, 1990, with a six-month visitor visa. Ursu maintains that he filed an application for political asylum on October 19, 1990. The application does not appear in the record. No action was ever taken on the purported application. Ursu remained in the United States illegally.

On December 11, 1997, Ursu was convicted of DUI/Manslaughter, Fla. Stat. § 316.193(3), a second degree felony under Florida law, and sentenced to eighteen months of imprisonment. Ursu had driven while intoxicated and had struck and killed another driver.

After Ursu's release from prison, the Immigration and Naturalization Service (INS) sought to deport him on the bases that he had remained in the United States illegally, 8 U.S.C. § 1227(a)(1)(B) (1998),[1] and that he had been

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[1] We cite the 1998 version of the United States Code throughout because that version was in effect when the INS initiated removal proceedings against Ursu in February 1998, and the relevant statutes have been frequently amended

convicted of an aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii) (1998). After a hearing, the IJ ordered Ursu's removal. The BIA affirmed, holding that Ursu was deportable because he had committed an aggravated felony, *id.*, and that he was ineligible for withholding of removal because, "having been convicted ... of a particularly serious crime," he was a danger to the community, 8 U.S.C. § 1231(b)(3)(B)(ii) (1998). The BIA further held that the INS was not estopped from deporting him based on its alleged failure to act on his petition for asylum.

We review the issue of our jurisdiction *de novo*. *See Sareang Ye v. INS,* 214 F.3d 1128, 1131 (9th Cir.2000). We also review *de novo* the BIA's determination that Ursu is ineligible for withholding of removal; however, we accord considerable deference to the BIA's interpretation of the relevant statute. *See Ramirez-Ramos v. INS,* 814 F.2d 1394, 1396 (9th Cir.1987).

[1] The BIA determined that Ursu had been convicted of an aggravated felony and was therefore deportable. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), we have jurisdiction to review the BIA's order of removal only if Ursu was *not* convicted of an aggravated felony. *See Sareang Ye,* 214 F.3d at 1131; *see also* 8 U.S.C. § 1252(a)(2)(C) (1998). Because of our holding in *United States v. Trinidad- Aquino,* 259 F.3d 1140 (9th Cir.2001), the INS now concedes that Ursu was not convicted of an aggravated felony. We agree and hold that we have jurisdiction to review the BIA's removal order.

[2] The BIA held that Ursu had been convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F)

(1998), which defines an "aggravated felony" as "a crime of violence." Such a conviction would make him ineligible for asylum, 8 U.S.C. § 1158(b)(2)(B)(i) (1998), and ***705*** would preclude our review, 8 U.S.C. § 1252(a)(2)(C) (1998). The court in *Trinidad- Aquino* held that the California crime of driving under the influence with injury to another, Cal. Veh.Code § 23153, was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (1998), *i.e.,* that it was not a crime of violence, because it could be committed with a *mens rea* of negligence. *Trinidad-Aquino,* 259 F.3d at 1145. As with the California statute at issue in *Trinidad-Aquino,* a person can violate section 316.193(3) under Florida law by acting with a *mens rea* of negligence. *See generally State v. Van Hubbard,* 751 So.2d 552 (Fla.1999). We conclude that DUI/Manslaughter under Florida law is not an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(F) (1998), and that therefore 8 U.S.C. § 1252(a)(2)(C) (1998) does not preclude our review.

**2 [3] We turn to the question of whether DUI/Manslaughter is a "particularly serious crime." If it is, then Ursu is ineligible for asylum under 8 U.S.C. § 1158(b)(2)(A)(ii) (1998), and ineligible for withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii) (1998).[2] [FN2]We grant the BIA's interpretation of the term deference

[2] 8 U.S.C. § 1158(b)(2)(A)(ii) (1998) provides that the Attorney General does not have the power to grant asylum if the "alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii) (1998) provides that withholding of removal is not available when "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." The BIA has consistently viewed the commission of a "particularly serious crime" itself as signifying that petitioner constitutes a danger to the community. *See, e.g., In re S-S-,* 1999 BIA LEXIS 1, at *23-24, Interim Decision 3374 (1999); *see also Ahmetovic v. INS,* 62 F.3d 48, 52 (2d Cir.1995); *Ramirez-Ramos,* 814 F.2d at 1397.

because it is the agency charged with enforcing the statute. *See Ramirez-Ramos,* 814 F.2d at 1396.

[4] The determination of whether a crime qualifies as particularly serious requires an examination of "the nature of the conviction, the type of sentence imposed, and the circumstances and facts underlying the conviction." *Mahini v. INS,* 779 F.2d 1419, 1421 (9th Cir.1986). Here, the BIA determined that the crime was particularly serious in light of the facts that Ursu had caused the death of another human being and that he was so intoxicated that he failed to realize that he had injured someone and continued to drive until his car became disabled. The BIA emphasized that the seriousness of the crime of driving under the influence and the substantial risk of harm from that behavior have been widely recognized.

The BIA's holding in the case before us is thus consistent with its prior decisions, and is entitled to our deference, provided that it reflects a reasonable interpretation of the statute. *See, e.g., Wilshire Westwood Assocs. v. Atl. Richfield Corp.,* 881 F.2d 801, 809 (9th Cir.1989). Given that Ursu caused the death of another human being and that he was so impaired that he continued to operate his vehicle without realizing what he had done, we agree with the reasonableness of the BIA's decision that his crime was particularly serious. We affirm the BIA's holding that Ursu is not entitled to withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii) (1998).

[5] Finally, we turn to Ursu's argument that INS should be estopped from deporting him. Even leaving aside the formidable barriers to bringing an estoppel claim against a United States government agency, *see, e.g., Sulit v. Schiltgen,* 213 F.3d 449, 454 (9th Cir.2000), we cannot ***706*** evaluate Ursu's estoppel claim because his asylum

application is not in the record. The immigration laws explicitly provide that "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A) (1998). *See also Fisher v. INS*, 79 F.3d 955, 963 (9th Cir.1996) (en banc). Because no evidence of Ursu's 1990 asylum application is before us, even if we assume Ursu did file such an application, we cannot properly on this record determine the merits of his estoppel claim.

AFFIRMED.